

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD COY CAIN,

Defendant-Appellant.

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UNPUBLISHED

January 28, 2003

No. 232097

Jackson Circuit Court

LC No. 98-091162-FH

Before: O'Connell, P.J., and Griffin and Markey, JJ.

PER CURIAM.

After a second jury trial, defendant was convicted of conspiracy to deliver marijuana, MCL 750.157a; MCL 333.7401(2)(d)(iii).<sup>1</sup> Defendant's conviction following his first trial was vacated after the prosecutor confessed error for not disclosing the plea bargain provided to his main witness, defendant's alleged coconspirator Richard Peterson. The trial court sentenced defendant to a prison term of 3 to 8 years as a third felony offender, MCL 769.11, and denied defendant's motion for acquittal or new trial. Defendant argues that under Wharton's Rule, the prosecutor presented insufficient evidence to sustain his conviction, that the trial court erred by not instructing the jury that it must find that defendant conspired to deliver marijuana to third parties and that error warranting reversal occurred when the trial court denied defendant's motion to disqualify the judge. We find that none of defendant's arguments warrant reversal and affirm.

Statutory construction presents an issue of law subject to de novo review. *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997); *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). Likewise, a claim that evidence at trial was insufficient to support a conviction raises an issue of law that this Court must review de novo, cf. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999), and this Court must view the evidence in a light most favorable to the prosecution and determining whether a rational trier of fact could have found all of the elements of the offense were proved beyond a reasonable doubt, *Jackson v Virginia*, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified on other grounds 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences therefrom may constitute sufficient evidence to find all the

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<sup>1</sup> The latter statute has been amended since the instant crime was committed.

elements of an offense beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Appellate review of the sufficiency of the evidence is deferential and this Court must make all reasonable inferences and resolve credibility conflicts in favor of the jury verdict. *Id.*; *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). A prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt “in the face of whatever contradictory evidence the defendant may provide.” *Nowack, supra* (citation omitted).

In this case, the prosecutor presented sufficient evidence, viewed in a light most favorable to the prosecution, from which a rational trier of fact could have found all of the elements of the offense of conspiracy to deliver marijuana were proved beyond a reasonable doubt. See *Wolfe, supra*. Further, Wharton’s Rule does not preclude the Legislature from imposing penalties for both conspiracy to deliver and delivery of a controlled substance arising out of the same incident. See *Denio, supra* at 695-696. However, even if it did, sufficient evidence existed here from which a rational jury could have found beyond a reasonable doubt that defendant conspired to deliver marijuana to third parties unknown to him. See *People v Hunter*, 466 Mich 1, 6-7; 643 NW2d 218 (2002).

Conspiracy at common law was a misdemeanor, *People v Causley*, 299 Mich 340, 347; 300 NW 111 (1941), but the Legislature has by statute proscribed it and established penalties contingent upon the penalty permitted or required for the target offense, *Denio, supra* at 695. MCL 750.157a provides, in pertinent part:

Any person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy punishable as provided herein . . . .

In this case, it was alleged that defendant conspired with Richard Peterson to commit the offense of delivery of marijuana prohibited by MCL 333.7401.

The terms “deliver” and “delivery” are defined by statute to mean “the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship.” MCL 333.7105(1); see also *People v Maleski*, 220 Mich App 518, 521; 560 NW2d 71 (1996). Unlike conspiracy to deliver, the offense of delivery of a controlled substance is a general intent crime and the act of transferring the controlled substance to another person is sufficient to establish a delivery. *Maleski, supra* at 522. The Legislature has not defined “transfer” but this Court has opined that its meaning “broadly contemplate[s] any conveyance of something from one person to another.” *Schultz, supra* at 703.

Our Supreme Court has described conspiracy as “a mutual agreement or understanding, express or implied, between two or more persons to commit a criminal act or to accomplish a legal act by unlawful means.” *People v Carter*, 415 Mich 558, 567; 330 NW2d 314 (1982), rejected on other grounds *People v Sturgis*, 427 Mich 392, 410, n 6; 397 NW2d 783 (1986). The gist of conspiracy is an unlawful agreement between two or more persons to commit an illegal act. *People v Mass*, 464 Mich 615, 632; 628 NW2d 540 (2001); *Carter, supra* at 568. The prosecutor must prove a twofold specific intent to obtain a conviction for conspiracy: the “intent to combine with others, and intent to accomplish the target offense.” *Carter, supra*; *People v*

*Justice*, 454 Mich 334, 345, n 18; 562 NW2d 652 (1997). In Michigan, the crime of conspiracy is complete upon the formation of the agreement, and therefore, unlike many other states and under federal law, proof of an overt act in the furtherance of the conspiracy is not necessary. *Mass*, *supra* at 643, n 33; *Carter*, *supra* at 568, n 3. Conspiracy to commit an offense is a separate and distinct offense from its target offense, *Mass*, *supra* at 632, 644, n 34, and both may be punished even though they arise out of the same transaction, *Denio*, *supra* at 695-696. Our Supreme Court has concluded that the Legislature intended to punish both planning to commit a drug offense (conspiracy) and its actual commission. *Denio*, *supra* at 711.

Like any other crime, conspiracy may be proved by direct or circumstantial evidence, which “is oftentimes stronger and more satisfactory than direct evidence.” *Hunter*, *supra* at 7, quoting *Wolfe*, *supra* at 526, agreeing with *State v Poellinger*, 153 Wis 2d 493, 501-502; 451 NW2d 752 (1990). As our Supreme Court has recognized, direct proof of an agreement is not required, *Justice*, *supra* at 347, provided “the circumstances, acts, and conduct of the parties establish an agreement in fact,” *Carter*, *supra* at 568, quoting *People v Atley*, 392 Mich 298, 311; 220 NW2d 465 (1974), overruled by *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002) (“In compliance with MRE 401, we overrule ‘the inference upon an inference’ rule of *Atley* and its progeny.”). In this case, the testimony of Peterson alone, if believed, clearly established an agreement in fact to transfer three pounds of marijuana from defendant to Peterson.

Defendant argues that Wharton’s Rule precludes a conspiracy conviction based on an agreement to deliver marijuana from defendant to Peterson. In *People v Clifton*, 70 Mich App 65; 245 NW2d 175 (1976), this Court examined Wharton’s Rule in the context of a guilty plea to conspiracy to deliver heroin. The defendant claimed on appeal that the trial court had failed to elicit an adequate factual basis because the defendant had stated that one David Rawls had called him and asked for heroin, and that he subsequently delivered heroin to Rawls rather than a third person. Instead, it was alleged Rawls and the defendant had conspired to provide someone with heroin. *Id.* at 67. This Court held that Wharton’s Rule precluded a conspiracy conviction on the facts elicited, relying on 16 Am Jur 2d, Conspiracy, § 16, p 136, “[A]n agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy where the crime is of such a nature that it necessarily requires the participation of two persons for its commission.” *Clifton*, *supra*. This Court also cited Perkins on Criminal Law 2d, p 620, which noted a rationale of Wharton’s Rule was that where the target offense requires concerted action and no persons beyond those necessary conspire to commit it, then no added danger is present so there is no logical reason to also impose liability for conspiracy. *Clifton*, *supra* at 67-68. This Court concluded that “[t]he defendant and Rawls were necessary parties to the commission of the illegal delivery. An agreement between the two to commit a crime that necessarily required agreement between the two does not amount to criminal conspiracy.” *Id.* at 69. However, under MCR 7.215(H)(1), *Clifton* is not binding precedent.

It is the Legislature that establishes what conduct is criminal and the punishment for such conduct that may be administered by the judiciary, *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001); *Denio*, *supra* at 709, including permitting common law offenses to remain or modifying them, MCL 750.505; *People v Riddle*, 467 Mich 116, 126; 649 NW2d 30 (2002). With respect to Wharton’s Rule, both the United States Supreme Court in *Iannelli v United*

*States*, 420 US 770, 782; 95 S Ct 1284; 43 L Ed 2d 616 (1975), and our Supreme Court in *Carter*, *supra* at 572, have recognized that it is no more than a judicial tool to discern legislative intent. The rule operated as an exception to the historical abolition of the common law doctrine that conspiracy merged into the completed offense. *Iannelli*, *supra* at 779. As explained by our Supreme Court:

The rationale for the rule is based on two different analyses. The primary justification relates to legislative intent; where cooperative action is a necessary component of the substantive offense, it is presumed that the Legislature took that element into account when setting forth the penalty for the offense. In addition, because the target offense itself requires concerted action, the combination constituting the conspiracy creates no added danger, because nothing is involved which will not [also] be present whenever the offense is committed.

In practice, Wharton's Rule generally operates as a judicial presumption to proscribe a conspiracy charge in the absence of legislative intent to the contrary. [*Carter*, *supra* (citations and internal punctuation omitted).]

Moreover, Wharton's Rule is only employed as a tool of construction when the target offense requires two participants for its commission, and its application is determined by examining the elements of the target offense, *id.* at 573; *Iannelli*, *supra* at 780. Thus where one person can logically commit the target offense, even though it may usually involve two people, Wharton's Rule does not apply.

If the offense could logically be accomplished by a single individual, Wharton's Rule does not apply. The fact that in a particular case cooperation between the offenders was a practical necessity, *i.e.*, the crime could not have been committed without concerted action or would have been made much more difficult without it, is not sufficient to invoke the rule. [*Carter*, *supra*.]

Michigan has abolished by statute the common-law doctrine of merger, MCL 768.4; *Causley*, *supra* at 347, and therefore, the Legislature has expressed its intent that conspiracy does not merge into the completed offense. Moreover, this Court has recognized that the Legislature's intent controls over application of Wharton's Rule, and holding for example that merger does not apply to gambling violations. *People v Weathersby*, 204 Mich App 98, 108; 514 NW2d 493 (1994); *Oakland Co Prosecutor v 46th Dist Judge*, 76 Mich App 318, 329; 256 NW2d 776 (1977). See also *Iannelli*, *supra* at 786-791, holding that Congress intended to retain conspiracy and target crimes as separate offenses in its strategy against organized crime and gambling. With respect to drug offenses, our Supreme Court has recognized that the Legislature intended to curb the harmful effects of drug trafficking by its adoption of laws regulating controlled substances, and in the face of a double jeopardy challenge, held that the Legislature did not intend that conspiracy to commit a drug offense would merge into the completed offense. *Denio*, *supra* at 711.

Finally, the fact that Banks and Tucker committed the conspiracy and the substantive drug offense in the same criminal transaction is of no consequence. We have repeatedly held that conspiracy is a crime that is separate and distinct

from the substantive crime that is its object. . . . Furthermore, the crime of conspiracy does not merge into the offense committed in furtherance of the conspiracy. . . .

Therefore, we hold, on the basis of the intent of the Legislature, that it does not violate the Double Jeopardy Clause of either the United States or Michigan Constitution to sentence a defendant to consecutive prison terms for conviction of a drug offense enumerated in § 7401(3) and conspiracy to commit that offense, even if committed in the same criminal transaction. [*Denio, supra* at 712.]

As applied to the case at bar, the Legislature's intent that conspiracy to commit a drug offense does not merge into the completed offense controls over Wharton's Rule, a judicial tool of construction. Moreover, Wharton's Rule does not apply to delivery of controlled substances because plurality of actors is not logically required for its commission. *Iannelli, supra* at 780-781; *Carter, supra* at 573.

In *People v Betancourt*, 120 Mich App 58; 327 NW2d 390 (1982), this Court addressed the application of Wharton's Rule to charges of delivery and conspiracy to deliver heroin. Looking to the elements of the target offense this Court determined that plurality of participants was not implied by delivery of heroin and found that to deliver a controlled substance did not require an agreement, nor did it require a "willing or culpable transferee of the controlled substance." *Id.* at 65. This Court concluded, "[t]he statute upon which defendant's target conviction was based simply does not necessarily require the cooperative acts of more than one person, and Wharton's Rule does not apply." *Id.* (internal punctuation and quotation omitted). Although *Betancourt* could be dismissed as dictum because the conspiracy also involved delivery to a third person, it is nonetheless persuasive dictum.

Both this Court and the Legislature have recognized that a delivery or transfer of controlled substances may be made to an unwilling or unaware transferee. See, e.g., *Schultz, supra* at 703-709, which held a delivery occurred when the defendant injected an intoxicated person with heroin, and MCL 333.7401a(1), which prohibits the delivery of a controlled substance without the transferee's consent to commit a sexual offense. Accordingly, Wharton's Rule does not operate to frustrate the Legislature's prerogative to prohibit both conspiracy to deliver a controlled substance and the offense of delivery of a controlled substance, even where only two people are involved.

Moreover, even if it was necessary to prove that defendant and Peterson conspired to deliver marijuana to a third party, the evidence at trial established sufficient circumstances from which a rational trier of fact could have concluded that an agreement in fact existed between defendant and Peterson that included future deliveries of marijuana by Peterson to parties unknown to defendant. See *Hunter, supra* at 7. It is well settled that coconspirators need not know all details and ramifications of the conspiracy. *Id.*

In this case, from the testimony of Peterson, the jury could have inferred that there was an ongoing relationship of supplier to retailer in the marijuana business between defendant and Peterson. Peterson's testimony, and that of various police officers, established that Peterson had

been engaging in significant marijuana trafficking, making sales of marijuana ranging from ounces to pounds. This testimony, together with the testimony of Peterson that he had purchased marijuana on prior occasions from defendant on credit, would permit a reasonable inference that defendant was aware that Peterson was selling marijuana, and not just personally consuming large quantities of marijuana. Indeed, that Peterson was sufficiently creditworthy to purchase the three pounds of marijuana in the instant case raises the inference that defendant believed Peterson was acting as a retailer of the marijuana who would be able to repay his marijuana debt from the proceeds of future sales to others. Furthermore, the fact that the marijuana was a significant amount – three pounds in three separate packages – leads to an inference of future deliveries rather than simply personal use. See *People v Konrad*, 449 Mich 263, 271, n 4; 536 NW2d 517 (1995); *Wolfe, supra* at 524; *People v Catanzarite*, 211 Mich App 573, 578; 536 NW2d 570 (1995).

This testimony, together with the police testimony describing the circumstances of an attempted purchase of marijuana by a police informant and the subsequent activity of defendant and Peterson that the police observed, as well as defendant being apprehended with \$1,100 of police marked money, was sufficient for a rational trier of fact to conclude that all of the elements of conspiracy to deliver marijuana had been proved beyond a reasonable doubt. See *Hardiman, supra* at 421.

For the reasons discussed above we find no error in the trial court's instructions to the jury. The trial court is required to "instruct the jury on the law applicable to the case," MCL 768.29; *People v Cornell*, 466 Mich 335, 341; 646 NW2d 127 (2002) (citation omitted), and alleged instructional error is therefore reviewed de novo on appeal, *Riddle, supra* at 124. Instructions must not be reviewed piecemeal to find alleged error, but rather as part the whole body of instructions. *People v Kelly*, 423 Mich 261, 270-271; 378 NW2d 365 (1985); *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Imperfect instructions will not require reversal if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Criminal jury instructions must address each element of the offense charged, as well as defenses and theories of the parties that are supported by the evidence. *Riddle, supra*; *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999).

The trial court instructed the jury on the charged offenses based on CJI2d 12.2, CJI2d 10.1, CJI2d 10.2, and CJI2d 10.3, which read together accurately instructed the jury it must find the twofold specific intent to enter an agreement to deliver marijuana and specific intent that the crime occur. See *Aldrich, supra* (jury instructions must be read as a whole), and *Carter, supra* at 568 (the prosecutor must prove a twofold specific intent to obtain a conviction for conspiracy). The trial court also accurately instructed the jury on the crime of delivery of marijuana. See MCL 333.7401(1) (delivery of controlled substances prohibited); MCL 333.7105(1) (delivery defined as "transfer"); *People v Steele*, 429 Mich 13, 25-26; 412 NW2d 206 (1987) (transfer is the element that distinguishes delivery from possession); *People v Delgado*, 404 Mich 76; 273 NW2d 395 (1978) (although not required by either case law or the statute, an instruction to the jury that knowledge is an essential element of the crime of delivery of a controlled substance guarantees that the accused possessed fundamental criminal mens rea).

Defendant's reliance on federal authority interpreting and applying federal law is misplaced. Although this Court may find federal authority persuasive, especially when federal courts interpret federal counterparts that are similar to Michigan's statutes or rules, *People v McEwan*, 214 Mich App 690, 697; 543 NW2d 367 (1995), this Court is not bound by federal case law, even if it interprets Michigan law, *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 402; 571 NW2d 530 (1997). As discussed *supra*, whether Wharton's Rule applies is a question of the intent of Michigan's Legislature in adopting its substantive criminal laws, *Carter, supra* at 572; *Weathersby, supra* at 108, and notwithstanding federal authority, this Court must, when interpreting Michigan law, ascertain and give effect to the intent of the Michigan Legislature, *Chambers v Trettco, Inc*, 463 Mich 297, 313-314; 614 NW2d 910 (2000). Conspiracy to deliver and delivery of a controlled substance are separate and distinct offenses, and the Legislature intends that both may be punished even though they arise out of the same transaction for the purpose of deterring drug trafficking. *Denio, supra* at 695-696, 709, 711-712.

Finally, defendant has waived further review of his claim that the trial court erred by not granting his motion for recusal by failing to file a transcript of the hearing before the chief judge or otherwise provide a record for appellate review. See MCR 7.210(B)(1)(a); *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995). Moreover, a review of the available record demonstrates defendant's claim has no merit.

The factual findings underlying a ruling on a motion for disqualification are reviewed for an abuse of discretion, while application of the facts to the law is reviewed de novo. *Cain v Dep't of Corrections*, 451 Mich 470, 503, n 38; 548 NW2d 210 (1996); *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). The grounds and procedure to disqualify a judge are contained in MCR 2.003. *People v Houston*, 179 Mich App 753, 755; 446 NW2d 543 (1989); *People v Bettistea*, 173 Mich App 106, 123; 434 NW2d 138 (1988). Although the court rule lists certain appearance-based grounds for disqualification, in general, proof of actual bias such that the judge can no longer impartially hear the case is required to disqualify a judge. *Cain, supra* at 494-495; *Houston, supra* at 756. The party who challenges a judge on the grounds of bias must overcome a heavy presumption of judicial impartiality. *Cain, supra* at 497; *Wells, supra*. Moreover, it must be shown that the alleged bias is not only personal but also has its source from outside of the judicial proceeding. *Cain, supra*; *Wells, supra*. Thus, knowledge gained or opinions formed by the judge during the course of the judicial proceedings will not demonstrate actual bias necessary for disqualification, "unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Cain, supra* at 496-497, citing *Liteky v United States*, 510 US 540, 555; 114 S Ct 1147; 127 L Ed 2d 474 (1994); *Wells, supra*. It follows that "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Cain, supra* at 497, n 30, quoting *Liteky, supra*.

Applying the above principles to the present case, it is patent that the alleged bias of the trial judge has its source in knowledge gained or rulings issued in earlier judicial proceedings on this case. Therefore, even if the trial court's decisions concerning bond were improper or erroneous, they do not form a basis for disqualification, *Bettistea, supra* at 124, nor do allegations of repeated adverse evidentiary rulings demonstrate actual bias necessary for disqualification, see *People v Fox*, 232 Mich App 541, 559; 591 NW2d 384 (1998); *Houston*,

*supra* at 759-760. Rather, the record here reveals a judge that issued rulings favorable to defendant, including suppressing evidence seized pursuant to a search warrant, and who acted with judicial restraint in the face of a contentious counsel. “A judge’s ordinary efforts at courtroom administration – even a stern and short-tempered judge’s ordinary efforts at courtroom administration – remain immune” from claims of bias or partiality. *Liteky, supra* at 556. In summary, none of defendant’s allegations of bias overcome the presumption of judicial impartiality. See *Wells, supra* at 391.

Affirmed.

/s/ Peter D. O’Connell  
/s/ Richard Allen Griffin  
/s/ Jane E. Markey